

Wang (Migration) [2023] AATA 1355 (8 May 2023)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Wai Kiat Wang
CASE NUMBER:	1833741
HOME AFFAIRS REFERENCE(S):	BCC2014/2222549
MEMBER:	Meredith Jackson
DATE:	8 May 2023
PLACE OF DECISION:	Brisbane
DECISION:	The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Partner) visa: • cl 801.221 of Schedule 2 to the Regulations •

Statement made on 08 May 2023 at 12:30pm

CATCHWORDS

MIGRATION – Partner (Residence) (Class BS) visa – Subclass 801 (Partner) – genuine and continuing partner relationship – property and car ownership – pooled financial resources – joint social activities – length of the relationship – decision under review remitted

LEGISLATION

Migration Act 1958, ss 5, 65, 359

Migration Regulations 1994, Schedule 2, cl 801.211; r 1.15

CASES

Ally v MIAC [2008] FCAFC 49

Bretag v IRT [1991] FCA 582

He v MIBP [2017] FCAFC 206

Jayasinghe v MIMA [2006] FCA 1700

MIEA v Poche (1980) 4 ALD 139

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 16 November 2018 to refuse to grant the applicant a Partner (Residence) (Class BS) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
2. The applicant Mr Wai Kiat Wang applied for the visa on 5 September 2014 on the basis of his relationship with his sponsor. At that time, Class BS contained only one subclass: Subclass 801 (Partner). The criteria for the grant of this visa are set out in Part 801 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl 801.221 of the Regulations. The delegate was not satisfied that the visa applicant at the time of decision was in a genuine and continuing relationship with the sponsor.
4. The applicant appeared before the Tribunal on 26 April 2023 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor, Ms Yan Ling Lin. The Tribunal hearing was conducted with the assistance of an interpreter in the Cantonese and English languages.
5. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

BACKGROUND

6. The applicant is Wai Kiat Wang, a citizen of Malaysia born in 1987. In March 2013, Mr Wang was granted a Student visa to study in the vocational sector. On 5 September 2014, he lodged an application for a Partner visa on the grounds of being in a relationship with an Australian citizen, Yan Ling Lin, to whom he was married on 26 August 2014. Mr Wang was granted a Partner (Provisional) visa on 4 November 2015. Information received by the Department in October 2015 alleged the relationship was contrived for immigration purposes and that Mr Wang had paid Ms Lin \$30,000 for the sponsorship. The parties claim the relationship is genuine and the dob-in was contrived. The parties have a son born in 2017.

ISSUES AND LAW

7. The issue in the present case is whether the applicant is the spouse or de facto partner of the applicant.

Whether the parties are in a spouse or de facto relationship

8. Relevantly to this matter, cl 801.221(2)(c) requires that at the time of this decision, the applicant is the spouse of the 'sponsoring partner', who must be an Australian citizen or Australian permanent resident or an eligible New Zealand citizen who was specified in the related Subclass 820 visa application as the spouse or de facto partner of the applicant. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen and was identified in the Subclass 820 visa application. On the evidence before it, the Tribunal is satisfied that the sponsor is the 'sponsoring partner' of the applicant.

9. 'Spouse' is defined in s 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s 5F(2)(a) - (d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and sponsor's household and their commitment to each other as set out in reg 1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in reg 1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

10. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The applicant has provided a Queensland Marriage Certificate certifying the parties were married on 26 August 2014 at Southport. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s 5F(2)(a).

Are the other requirements for a spouse relationship met?

11. In forming a view of the relationship, the Tribunal has carefully examined the evidence both oral and documentary pertaining to each matter in reg 1.15A(3)(a), (b), (c) and (d), and considered other circumstances of the relationship under reg 1.15A(2). The Tribunal finds as follows.
- *Financial aspects of the relationship - including joint ownership of assets; joint liabilities; extent of pooling of financial resources; any legal obligations owed to the other party; any sharing of day-to-day household expenses.*
12. The parties own a residential property in Molendinar, Queensland, for which they hold a mortgage in joint names at NAB Bank. They purchased the home at the end of 2014, they claim and provided a residential lease for a rental property in joint names between 46 December 2013 and 4 December 2014. While no mortgage documentation is provided, the Tribunal, for the purposes of this decision, accepts those timeframes. Prior to that time, the applicants held a joint bank account at an address in Robert Street, Labrador, the home of the sponsor's parents. The applicant has provided evidence of the registration of a Toyota Yaris in the parties' joint names which commences on 25 July 2014, and a photograph of the new car handover. The applicant also provided a bank account in the sponsor's name which reflects payments for household outgoings. He stated in the hearing that he controls the funds as his wife tends to forget to pay things. The applicant also stated they use an American Express credit card for most outlays in order to accrue points. The applicant addressed the Tribunal's concerns about the multi-account flow of funds within the relationship from their transactional accounts to the home loan account by stating that he routinely transferred funds to the correct account for an automated debit of the parties' mortgage repayments.
13. The Tribunal is satisfied the parties have joint assets and joint liabilities, they pool financial resources and share day-to-day household expenses. The Tribunal finds the financial aspects of the relationship to be consistent with a spousal relationship.
- *Nature of the household - including any joint responsibility for care and support of children; parties' living arrangements; and any sharing of housework.*

The parties live in their mortgaged residential property with their now six year old son, a student at Trinity College. They provide a wide range of documents and photographs reflecting cohabitation and joint care for their child, whose birth certificate was provided after the hearing. The sponsor claimed in her oral evidence that her spouse is “a very good man”; that he looks out for her and her son very well, he cooks, prepares food and picks up their son from school. She states the child is very close to his father and “welcomes Daddy home”.

14. The Tribunal is satisfied the parties share responsibility for their child, and that they live together at their residential property and share household responsibilities.

- *Social aspects of the relationship - including whether parties represent themselves to other people as being married to each other; the opinion of friends and acquaintances about the nature of the relationship; and any basis on which the persons plan and undertake joint social activities.*

15. The applicant provided a large bundle of evidentiary photographs depicting the parties at various life stages, including on engagement evening, at the birth of their son, purchasing their car, while eating out and visiting Santa Claus with the infant. Other photographs depict their “marriage registration” on 26 August 2014, at friends’ events and a wedding, at their son’s own and at other children’s birthday parties, and at their larger wedding in Malaysia. Post-hearing photographs provided show the parties with their older child at various events including at swimming pools and beaches, amusement parks and various other outdoor locations.

16. The Tribunal notes that declarants supporting the relationship made their statements in 2017 and the Tribunal places limited weight upon them. However the Tribunal, on balance, is satisfied the parties represent themselves to other people as being married to each other and that they plan and undertake joint social activities.

- *Nature of persons’ commitment to each other - including duration of the relationship; the length of time they have lived together; degree of companionship and emotional support they draw from each other; and whether they see the relationship as long-term.*

17. The applicant provided to the Tribunal considerable documentary evidence of the progression of the relationship from around 2012 through to the present time. It is consistent with the oral evidence provided and tends to align with the dates on departmental records and various bank, travel and household receipts. The Tribunal is satisfied that the relationship has evolved as claimed over a decade from early 2013.

18. Some insights are drawn also from the presentation at the hearing: the parties appeared close and comfortable in one another’s company at the hearing, leaving the impression that they were a genuine couple getting on with family life, as they and their declarants claim is the case. They openly discussed the difficulties with Ms Lin’s fertility and the low chance of her conceiving now, given her increasing age.

19. 359AA

20. In the hearing, the Tribunal addressed a matter of a dob-in which alleges the relationship is contrived for migration purposes, noting that the information had previously been put to the applicant by the Department and he had responded, and had also written to the Tribunal about the issues raised by the Department. However as the matters alleged were very relevant to his case, the Tribunal indicated, it would put the information to him again.

21. Adopting the procedure outlined in s 359AA of the Act, the Tribunal said that there was information on the Department file which is subject to a certificate regarding the Tribunal's discretion to disclose information under s 376 of the Act. The Tribunal gave a copy of the certificate to the applicant and asked if he considered it a valid certificate. The applicant stated he did not know whether the certificate was valid. The Tribunal stated that it considered the certificate to be valid because it gave a valid reason as to why the information could not be disclosed to him in full.
22. The Tribunal said it would put the information covered by the certificate to the applicant, who could take reasonable time to consider it, and if he required additional time, he could request it or provide it in writing. The Tribunal said the information, which he had considered before, was that his relationship with his sponsor was contrived for the purpose of obtaining the visa, and that he had paid his sponsor \$30,000 to sponsor him for a visa and that he and the sponsor purchased a house together using this money and he intended to divorce his sponsor after the visa is granted and the sponsor would keep the house so there is no record. Further, that he and his spouse were not living together when he first lodged his visa application, the sponsor was living with her parents, that at that time, the sponsor's mother did not know that the parties are married. The Tribunal said the information was important to the review as if the Tribunal were to rely on it, it would be the reason, or part of the reason, to affirm the decision because the information may indicate that the relationship is not genuine and that the applicant had contrived to marry an Australian citizen for the purposes of a migration outcome.
23. The applicant chose to respond in the moment. He said the parties were married on 26 August 2014, and bought their house at the end of the year 2014. Before that he was living with his wife and her parents' house; and with her being Asian, he said, it stands to reason they would not have accepted that the parties should live together before marriage. He put a view, in summary, that a former, disgruntled employer lodged the allegations in a vexatious manner, to damage his business because he had left their firm on difficult terms and he runs a bus company that the employer, wrongly, saw as competition. Regarding the allegation that the parties lived separately and not together before marriage, he stated that they were living in different houses on and off, and seeing each other whenever they could, back and forth between her family home and the bus company home.
24. The Tribunal has carefully considered the applicant's discounting of the allegations. It has weighed his responses over time about the development and nature of the relationship and found them to be reasonably consistent and believable, particularly given the time frame of this case. The Tribunal is mindful of the authority in *Ally v MIAC* [2008] FCAFC 49 at [32]–[35]; *Jayasinghe v MIMA* [2006] FCA 1700 at [35], citing *MIEA v Poche* (1980) 4 ALD 139 at [24] per Deane J which held that evidence of subsequent events may be taken into account if it 'tends to logically show the existence or non-existence of' the relationship at that particular time; and see also *Bretag v IRT* [1991] FCA 582 at [13]–[15]. In the present matter, the evidence weighs in favour of existence.
25. While continuing to observe the procedure in 359AA of the Act, the Tribunal said it may also have a concern that the parties were keeping their money separate because it is not a genuine relationship, and the plan may be to split up once the visa is granted. The applicant responded that this would never happen, because after he got the visa a divorce would be impossible, I am not young now, it would be impossible to start a new family now.
26. The Tribunal observed a closeness within the relationship in the hearing; and notes that similarly, the photographic and other evidence provided of them with their Australian son is candid and convincing. Whether the parties accurately recalled the details of who attended their two marriage ceremonies, when telephoned by the department, is of less concern to the Tribunal than the facts of their union since, particularly given the time elapsed, and taking

into account that they appear to have rated their Australian marriage registration as more of a formality, an engagement even, and the more traditional, Malaysian wedding, as the real thing.

27. It is of course possible that the parties, or any parties, may conceive a fake marriage for immigration purposes. The Tribunal put this to each of them, stating that perhaps they were involved in an elaborate scheme to persuade the Department to issue a visa, and might split after the applicant attained permanency. The applicant denied this as impossible, and restated his claim of vexatiousness on the part of the informant. The sponsor also denied it stridently, and defended her spouse against the employer she believes reported on him. The Tribunal observed an air of somewhat defiant, emotional support for one another in the hearing.
28. For completeness, the Tribunal notes, but draws little conclusion from the fact, that the applicant's provisional-stage, UK820 Partner visa appears to have been issued on 4 November 2015, which was shortly after the Department received the dob-in of 27 October 2015.
29. The Tribunal having considered all the evidence before it with regard to the dob-in information is inclined to give no weight to it, being not satisfied that it should be relied upon as genuine and without some element of manipulation.
30. In conclusion, some facts stand out. The relationship has survived a decade; at a minimum, the parties own assets and they live in a residential house together. More importantly, they have a five year old son, whose future happiness, rights as a citizen and potentially his support network and family stability is at stake in this matter. This even if, as is the case here, the applicant stated at the hearing, when asked, that if refused a visa, he would make arrangements to sell up and move his small family to Malaysia; there would be no other choice. His wife would not be happy with that, he said because the child is studying now and living in Australia is normal to him. Further, the applicant stated, it would be "impossible" to start over with a new family at the age of 40.
31. The Tribunal is satisfied that the nature of the commitment between the parties is genuine and for the long-term.
32. Pursuant to s 5F(2)(b)-(d) of the Act, the Tribunal finds the applicants have a mutual commitment to shared life to the exclusion of others; a genuine and continuing relationship; and live together and not separately and apart on a permanent basis.
33. Given these findings the Tribunal is satisfied that the requirements of s 5F(2) are met at the time of this decision. Therefore the applicant meets cl 801.221(2)(c).
34. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 801 visa.

DECISION

35. The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Partner) visa:
 - cl 801.221 of Schedule 2 to the Regulations

Meredith Jackson
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).